

December 15, 2004

Marlene H. Dortch, Esq.
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

ELECTRONIC FILING

RE: Petition for Stay of the changes to 47 CFR 90.203(j)(4) adopted in the Second Report and Order (FCC 03-34), WT 99-87

Dear Ms. Dortch:

Attached is a Petition for Stay asking to stay the effect of certain rules changes adopted in the above referenced proceeding.

For your information I am also providing electronic copies of the petition to the relevant Legal Advisor of each Commissioner; the Commission Chief of Staff, the Chief of the Wireless Telecommunications Bureau; and the Chief of the Public Safety and Critical Infrastructure Division.

If there are any questions, please do not hesitate to contact me.

Sincerely,



Robert J. Speidel, Esq.
Manager, Government Affairs - Regulatory Policy

cc: Sheryl J. Wilkerson, Esq.
Bryan Tramont, Esq.
Jennifer Manner, Esq.
Paul Margie, Esq.
Sam Feder, Esq.
Barry Ohlson, Esq.
John Muleta, Esq.
Michael Wilhelm, Esq.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Implementation of Sections 309(j) and 337)	WT Docket No. 99-87
of the Communications Act of 1934 as)	
Amended)	
)	RM-9332
Promotion of Spectrum Efficient)	
Technologies on Certain Part 90)	
Frequencies)	

Petition for Stay

To the Commission:

INTRODUCTION

M/A-COM, Inc. (“M/A-COM”), pursuant to Section 1.429(k) of the Commission’s rules,¹ respectfully submits this Petition for Stay of the effect of the changes to § 90. 203(j)(4)² adopted by the Commission in the *Second Report and Order*³ in the above-captioned proceeding.

¹ 47 C.F.R. §1.429(k).

² 47 C.F.R. §90.203(j)(4)

³ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, WT Docket No. 99-87, and Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, RM-9332; Second Report and Order, (2003), adopted February 14, 2003; released February 25, 2003 (“*Second Report and Order*”).

BACKGROUND

In this *Petition*, M/A-COM asks the Commission to stay the effect of the changes to §90.203(j)(4) adopted in the *Second Report and Order* which changes eliminate a 25 khz mode of operation in transmitters operating on frequencies in the 150-174 MHz and 421-512 MHz for which application for Part 90 certification are received by the Commission on or after January 1, 2005. The requested stay would remain in effect until such time as the Commission issues a Memorandum Opinion and Order resolving the Petitions for Reconsideration of the *Second Report and Order* submitted by M/A-COM and others.⁴

Prior to the adoption of the rules changes in the *Second Report and Order*, the language of § 90.203(j)(4) read as follows:

(j) Except where otherwise specifically...

...

(4) Applications for certification received on or after January 1, 2005, except for hand-held transmitters with an output power of two watts or less, will only be granted for equipment with the following channel bandwidths:

(i) 6.25 kHz or less for single bandwidth mode equipment;

(ii) 12.5 kHz for multi-bandwidth mode equipment with a maximum channel bandwidth of 12.5 kHz if it is capable of operating on channels of 6.25 kHz or less;

⁴ American Mobile Telecommunications Association (AMTA), the Industrial Telecommunications Association, Inc. (ITA) and PCIA – The Wireless Infrastructure Association (PCIA) Petition for Reconsideration, filed August 18, 2003; Kenwood U.S.A. Corporation (Kenwood) Petition for Reconsideration, filed August 18, 2003; Motorola, Inc. Petition for Reconsideration, filed August 18, 2003; American Association of Paging Carriers, Allied National Paging Association, Arch Wireless Operating Company, LLC and Metrocall Holdings, Inc. Petition for Reconsideration, filed August 18, 2003; The American Petroleum Institute (“API”) and the United Telecom Council (“UTC”) Petition for Reconsideration, filed August 18, 2003; Tait North America, Inc. (TAIT) Petition for Reconsideration, filed August 18, 2003; Private Wireless Mining Coalition Petition for Reconsideration, filed August 18, 2003; Association of Public-Safety Communications Officials-International, Inc. (APCO) Petition for Reconsideration, filed August 18, 2003; Private Paging Coalition (filed under the name “Blooston, Mordkofsky, Dickens, Duffy & Prendergast”) Petition for Reconsideration, filed August 18, 2003; Association of American Railroads Petition for Reconsideration, filed August 18, 2003; Suffolk County (NY) Police Department Petition for Reconsideration, filed August 13, 2003; Federal Law Enforcement Wireless Users Group (FLEWUG) Petition for Reconsideration, filed August 1, 2003; Public Safety Wireless Network (PSWN) Petition for Reconsideration, filed August 1, 2003; and the State of Florida, State Technology Office Petition for Reconsideration, filed March 27, 2003. (collectively hereinafter “*Reconsideration Petitions*”)

- (iii) 25 kHz for multi-bandwidth mode equipment with a maximum channel bandwidth of 12.5 kHz if it is capable of operating on channels of 6.25 kHz or less; and
- (iv) Up to 25 kHz if the equipment meets the spectrum efficiency standard of paragraph (j)(5) of this section.

The rules changes, as regards § 90.203(j)(4), adopted in the *Second Report and Order* eliminated subsections (iii) and (iv) from the language § 90.203(j)(4), such that § 90.203(j)(4), in its entirety, now reads as follows:

(j) Except where otherwise specifically...

- ...
 - (4) Applications for certification received on or after January 1, 2005, except for hand-held transmitters with an output power of two watts or less, will only be granted for equipment with the following channel bandwidths:
 - (i) 6.25 kHz or less for single bandwidth mode equipment;
 - (ii) 12.5 kHz for multi-bandwidth mode equipment with a maximum channel bandwidth of 12.5 kHz if it is capable of operating on channels of 6.25 kHz or less.

The changes adopted in the *Second Report and Order* made no changes to § 90.203(j)(5) even though the only antecedent basis for § 90.203(j)(5), which was originally contained in § 90.203(j)(4)(iv), has been removed by the rules changes adopted by such *Second Report and Order*.

If no stay of the effect of the rules changes to § 90.203(j)(4) adopted in the *Second Report and Order* is granted, many spectrum efficient technologies developed in good faith reliance on the efficiency requirements adopted during the *Refarming*⁵ proceeding in the mid 1990's will be precluded from implementation in the 150-174 MHz and 421-512 MHz bands, for no beneficial reason.

⁵ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, PR Docket No. 92-235 (*"Refarming"*)

DISCUSSION

The Commission may stay the effective date (*or effect*) of a new rule upon “good cause shown.”⁶ In considering a request for stay, the Commission should generally consider the four criteria set forth in *Virginia Petroleum Jobbers Association*.⁷

The four criteria outlined in *Virginia Petroleum Jobbers Association* are (1) a likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) the issuance of the order will further the public interest.⁸ The Commission should then balance these interests in order to determine an administrative response on a case-by-case basis.⁹ The relative importance of the four criteria will vary depending upon the circumstances of the case.¹⁰

As regards this Petition’s particular request the facts indicate all four criteria are fully satisfied and justify the issuance of the requested stay.

There should be little doubt the requests in a number of the *Reconsideration Petitions* concerning the 25 kHz operating bandwidth mode will be viewed favorably by the Commission when a Memorandum Report and Order is adopted. As many of the *Reconsideration Petitions* argue, when adopting the *Second Report and Order*, apparently the concept of equivalent efficiency was not properly taken into account. The rules changes adopted in the *Second Report and Order* fail to recognize spectrum efficiency is not solely a function of decreasing operational bandwidth.

During the pendency of the *Refarming* proceeding the concept of equivalent efficiency was embraced by the Commission when it adopted the original rules language of §90.203(j)(4)(iv) and § 90.203(j)(5) requiring manufacturers to provide new certified radios with 6.25 kHz or

⁶ 47 C.F.R. 1.429(k)

⁷ *Virginia Petroleum Jobbers Ass’n. v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also*, e.g., Implementation of Section 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Order*, WT Docket No. 99-87, 18 FCC Rcd 25491 (2003) (*BBA Stay*); Biennial Regulatory Review – Amendment of Parts 0, 1, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order*, WT Docket No. 98-20, 14 FCC Rcd 9305, 9307 (1999) (*ULS Stay*).

⁸ *Virginia Petroleum Jobbers Ass’n.*, 259 F.2d at 925.

⁹ *BBA Stay*, 18 FCC Rcd at 25493; *ULS Stay*, 14 FCC Rcd at 9307.

¹⁰ *BBA Stay*, 18 FCC Rcd at 25493; *ULS Stay*, 14 FCC Rcd at 9307.

equivalent efficiency as of January 1, 2005. The Commission correctly recognized that many true multiple access technologies, such as TDMA, might be the most effective and in certain cases the only practical way to realize 6.25 kHz or equivalent efficiency in the 150-174 MHz and 421-512 MHz bands particularly in T-Band.¹¹

Furthermore, the Commission correctly recognized during the pendency of the *Refarming* proceeding that allowing operating bandwidths up to 25 kHz was the best way to foster realizing the Commission's policy of "technical neutrality," while at the same time demanding more spectrally efficient equipment.

In light of the foregoing, the requests in a number of *Reconsideration Petitions*, to focus on spectrum efficiency rather than simply operating bandwidth, and allow operating bandwidths up to 25 kHz, should be granted. Thus, consideration of the first criteria in the balancing act the Commission needs to perform in evaluating this instant request for stay indicates the stay should be granted.

Will there be irreparable harm if the stay is not granted? The answer is very likely yes. Thus, consideration of the second criteria also indicates the stay should be granted.

What sort of irreparable harm will there be? There are several forms of irreparable harm that will be occasioned by the Commission's failure to grant the requested stay. First, as noted previously, many manufacturers have invested heavily in the development of spectrally efficient technologies in good faith in order to satisfy the *Refarming* efficiency mandates adopted almost ten years ago. These technologies often employ operating bandwidths up to 25 kHz, in any case wider than 12.5 kHz, and the investment has taken place over the past 10 years since the adoption of the *Refarming* 2005 efficiency mandates and not just since the adoption of the rules' changes in the *Second Report and Order*. Certainly a large portion of the investment in the development of these technologies took place long before the adoption of the rules changes in the *Second Report and Order*, which was the first time the Commission eliminated operating bandwidths greater than 12.5 kHz in the 150-174 MHz and 421-512 MHz bands.

¹¹ 470-512 MHz, as authorized in Part 90, Subpart L.

Failure to grant the requested stay will result in irreparable harm to those manufacturers who have developed spectrally efficient technologies by good faith reliance on the *Refarming* rules.

The second form of irreparable damage likely to result from failure to grant the requested stay, is impairment of interoperability among first responders. A major objective for the Commission over the past several years has been to improve interoperability among first responders. While achievement of interoperability requires adequate attention to more than simply equipment technical parameters, removal of any 25 kHz operating bandwidth capability from all new equipment in the 150-174 MHz and 421-512 MHz bands will hinder interoperability among first responders. As agencies move to new equipment and technologies, that under the current rules will likely not have a 25 kHz operating bandwidth mode, such agencies will likely lose any interoperability capability with first responder agencies that do not move to newer equipment until the mandated dates, which could be as late as 2018. Such a result is entirely incongruous with the Commission's desire to improve interoperability among all levels of first responders. One can certainly argue a diminution of interoperability capability would do irreparable harm to the public interest and to the public safety community at large.

The third criteria used when considering a request for stay involves making a determination who will be injured if the stay is granted, and to what degree will those interests be harmed. As regards the present request for stay, M/A-COM is unable to identify any degree of injury to any interest that would be the proximate result of granting the requested stay. In fact, as discussed previously, M/A-COM can only identify damage resulting if the Commission does not grant the requested stay.

Finally, issuance of the requested stay will further the public interest. The stay will enable the Commission to assist in furthering the public interest of improved communications interoperability among first responders. The stay will also further the public interest associated with the Commission's desire for rules that are technology neutral in order to facilitate aggressive competition thereby providing procurement financial benefits. Furthermore, granting the stay will further the public interest by facilitating the realization of improved spectrum efficiency in the 150-174 MHz and 421-512 MHz bands by allowing all relevant

technologies to be fully considered. No technologies will be eliminated due to an ill-advised, misdirected and unreasonable focus on operating bandwidth limitations alone.

The Commission's task balancing these four criteria is a very simple task in this particular case. Consideration of each criterion weighs in favor of granting the requested stay. There are no factors present indicating the Commission should not grant the stay.

M/A-COM wants to reiterate this request for stay is only directed at staying the effect of the rules' changes adopted in the *Second Report and Order* wherein 25 kHz operating bandwidths were banished from new equipment in the 150-174 MHz and 421-512 MHz bands as of January 1, 2005. M/A-COM does not request the Commission stay the provisions of §90.203(j)(4) in total.

The mandate on manufacturers to include 6.25 kHz or equivalent modes in new equipment in the 150-174 MHz and 421-512 MHz bands as of January 1, 2005 was adopted almost ten years ago as part of the *Refarming* proceeding. M/A-COM believes manufacturers have had more than enough time to develop the requisite spectrally efficient technologies, and many manufacturers have developed such technologies and are in a position to comply with the January 1, 2005 mandate. The Commission should not retreat from any existing mandate on manufacturers to provide spectrally efficient equipment in the 150-174 MHz and 421-512 MHz or in any other spectrum band, simply because the corresponding users have not been mandated to utilize such spectrally efficient equipment at this time. Any spectrum efficiency that may be realized because spectrally efficient equipment is simply available, is more than sufficient reason for the mandates on manufacturers to remain in place.

CONCLUSION

M/A-COM applauds the Commission for its actions in the *Second Report and Order* to implement the actual utilization of spectrum efficient technologies in the 150-174 MHz and 450-512 MHz frequency bands.

However, for the reasons set forth above, the Commission should stay the effect of the rules changes to § 90.203(j)(4) adopted in the *Second Report and Order*, and should allow 25

kHz operating modes in new equipment in the 150-174 MHz and 421-512 MHz bands for which applications for Part 90 certification are submitted on or after January 1, 2005.

Therefore, M/A-COM respectfully requests the Commission grant the stay requested herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert J. Speidel". The signature is fluid and cursive, with the first name "Robert" and last name "Speidel" clearly distinguishable.

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